

MEMORANDUM

TO: Division of Shellfish Sanitation Staff

FROM: Cloyde W. Wiley, Director
Division of Shellfish Sanitation

THROUGH: Eric H. Bartsch, P.E., Director
Office of Water Programs

SUBJECT: Shellfish and Crustacea Plants - Procedure - Enforcement

DATE: March 27, 1991

Cancel Working Memos #84 and #130

The purpose of this memo is to establish a standardized scheme of action to follow in the development and implementation of shellfish and crustacea plant enforcement actions.

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PART I - GENERAL

§1.1. Enforcement Priority

Enforcement actions processed by the Division must be in accordance with Chapter 1.1:1 (§9-6.14:1 et seq.) of Title 9 of the Code of Virginia, (the Administrative Process Act), as well as Health Department guidelines. Many of the procedures required by the APA for upper level enforcement actions take a great deal of time and documentation in order to process. It is for this reason that all efforts must be made to resolve problems of noncompliance before they reach this level. The priority given to an enforcement action may depend in a large part on the willingness of the local commonwealth's attorney or the Attorney General's office to assist in the action. As a result, the potential exists that a situation which may need action will have to be held as "pending" until DSS can obtain legal aid from one of the sources listed above.

§1.2. Uncertified or Contaminated Product

Shellfish, crustacea or products thereof that are uncertified or are deemed to be contaminated are a potential threat to public health. Such determination constitutes prima facie evidence of a significant public health hazard and the shellfish, crustacea or products thereof shall be embargoed, relayed or destroyed.

A. Embargo

An embargo order should be placed on any shellfish, crustacea or products thereof which are uncertified or are determined to be contaminated or there is probable cause to believe have been contaminated. Under an embargo order, shellfish, crustacea or products thereof shall be labeled as such and stored in a conspicuous manner with adequate separation from other product. The plant owner or authorized supervisor should be notified of the embargo order and informed that the product can not be moved, relabeled, retagged, packed, repacked, processed, reprocessed, altered, sold, disposed of, or destroyed without authorization. The embargo order should not be removed, except by court order, until the product is deemed to be safe for consumption or the product is destroyed under DSS supervision.

B. Voluntary Destruction

In lieu of the process outlined in 1.2 A., the owner or possessor of any misbranded or potentially contaminated shellfish or crustacea or products derived therefrom shall have the privilege of voluntarily destroying such products under the supervision of the Division. In most cases, voluntary destruction is the preferred method of handling uncertified or potentially contaminated product. It is, however, subject to the cooperation of the processor of the product. All product destruction shall be conducted in accordance with Working Memo #128.

C. Relaying.

Misbranded or potentially contaminated shellstock may be relayed unless contaminated with toxic substances as opposed to voluntary destruction as outlined in section 1.2 B. After authorization from the central office, VMRC should be contacted to observe the relaying of the questionable product.

D. Reconditioning.

In some specific circumstances, product may be deemed safe for consumption after an approved reconditioning procedure. Once embargoed, product may only be reconditioned by request to the director. All reconditioning procedures must meet applicable state and federal requirements.

§1.3 Administrative Hearings.

A. Informal Hearings.

Informal hearings are held as a first step in upper level enforcement for certified dealers who have been documented as having a significant number of repeat deficiencies, or a single deficiency with a high degree of public health significance. In most cases the hearing will be held in the field office. However, if the problem to be discussed deals with a serious public health deficiency it may be held in the central office. When a deficient shellfish or crustacea plant meets the criteria for the convening of an informal hearing set forth in Working Memo #189, the following procedure should be used:

- o A Notice of Administrative Hearing (**Appendix A**) should be sent Return Receipt Requested to the dealer two weeks prior to the date set for the hearing.
- o One week prior to the hearing date a sanitarian or field director should make a phone call or personal visit to the dealer to confirm receipt of the notice. If not received, a copy of the notice should be hand delivered.
- o An opening statement should be prepared which documents the reason for the hearing including a comprehensive history of deficiencies with dates and types of violations identified.
- o An item-by-item discussion of the deficiencies should be conducted and a compliance schedule developed. The compliance schedule should be signed by the dealer and the director (field director for field office hearings) and notarized unless a Notary Public is not available in the field office.
- o A summary of the findings of the hearings should be prepared within one week after the hearing. This will include information on each item discussed and the corrective action that has been or is to be taken. This is to be forwarded to the central office upon completion with the compliance schedule attached.

B. Formal Hearings.

Formal hearings are the final efforts taken by the Division prior to legal action in cases involving certified dealers. The primary purpose of the formal hearing is to determine whether the dealer's Certificate of Inspection should be continued or revoked. In addition, an Administrative Order from the Commissioner may be issued to require or prohibit a party from doing something. Because of the extensive Administrative Process Act requirements involved in convening a formal hearing, only deficiencies of high public health significance will be used as criteria for holding the formal hearing.

When it has been determined to the satisfaction of the director that a formal hearing will be required in order to achieve compliance, the following procedure should be used:

- o A memo should be prepared for the Health Commissioner's signature directed to the Executive Secretary of the Supreme Court asking that a hearing officer be appointed. A cover memo must also be prepared for the director's signature directed to the Health Commissioner describing the situation and asking that he use the attached memo to make a request to the Executive Secretary of the Supreme Court for the appointment.
- o After a reply is received from the Commissioner, a Notice of Administrative Hearing (**Appendix A**) should be sent Return Receipt Requested to the dealer at least 30 days prior to the date set for the hearing.
- o A court reporter should be contacted to record the proceedings.
- o An opening statement should be prepared for the hearing officer which documents a comprehensive history of deficiencies with dates and types of violations identified, and the specific laws or regulations that have been violated.
- o The conduct of the formal hearing will be very much like a court case, with the hearing officer acting as the administrative law judge. The involved party may submit oral and documentary evidence and rebuttal proofs and he may cross-examine witnesses produced by the Division. The hearing officer will hear the case and, based on the laws and evidence presented, will decide the case.

After an adverse case decision, the formal hearing may be subject to a court review on the following issues:

1. Whether DSS had constitutional power to act as it did.
2. Whether DSS acted within statutory authorization and jurisdiction.
3. Whether DSS acted in accordance with prescribed procedure.

4. Whether there is some substantial evidence in the record to support the finding of fact DSS made.

Before entering into a formal hearing, we must be absolutely certain that these issues have been satisfied.

§1.4. Legal Action

A. Criminal Actions

Criminal actions initiated by DSS will, in most cases, be directed toward uncertified processors. These processors may, however, be former certified dealers whose certifications have been revoked or recertification denied. In order to process a criminal action for an uncertified dealer, DSS must conduct inspections, develop evidence, file a complaint, and have the case heard in court. During an investigation, it may prove to be very beneficial to contact the Commonwealth's Attorney and magistrate of the locality involved before any formal action is pursued.

1. Inspections

Evidence used for legal actions against uncertified dealers is obtained by means of inspections of the facilities in question. These inspections may be voluntary or mandatory.

a. Voluntary Inspections

Under normal circumstances voluntary inspections shall be attempted before a mandatory inspection is conducted.

Exceptions to this will be dealt with on a case-by-case basis. When evidence has indicated that an uncertified dealer has continued to process shellfish or crustacea meat even after warnings have been issued, two DSS representatives should visit the facility and inform the owner that they would like to conduct an inspection. If the dealer agrees, a thorough inspection shall be conducted with all deficiencies noted and all uncertified product handled as described in §1.2. Photographs of the facility and premises should be taken during any inspection of uncertified shellfish or crustacea processing facilities.

b. Mandatory Inspections

When a dealer refuses the voluntary inspection and there is a reasonable belief that the cause for the inspection is just, a mandatory inspection may be conducted. Mandatory inspections are allowed only after an inspection warrant has been obtained as described in §1.4 C. In most cases, a voluntary inspection must have been attempted before an inspection warrant will be issued.

2. Developing Evidence.

Evidence is the factual information presented as proof during the trial of a lawsuit. The outcome of the suit will depend upon the proof presented and only that proof.

Evidence may be divided into two kinds, direct and circumstantial. Direct evidence is factual information which immediately compels a conclusion on the disputed issue. Nothing must be inferred in order to draw the conclusion from the direct evidence. Circumstantial evidence does not relate directly to the disputed issue, but relates directly to another fact which in turn relates to the disputed issue. In other words, the second fact must be inferred from the existence of the first fact in order to draw a conclusion about the disputed issue. Contrary to popular misconception, the two types of evidence are equally admissible, and both types will support a verdict on the issue. For example, if a sanitarian took refrigerator temperatures with a thermometer, the results would be direct evidence as to whether the refrigerators were kept at required temperatures. If the sanitarian noticed some spoiled food that had not been in the refrigerator very long, that would be circumstantial evidence that the refrigerators were not at required levels. Either piece of evidence would be admissible, although obviously the direct evidence would be more helpful.

3. Filing the Complaint

Once the necessary evidence has been obtained, the magistrate of the city or county where the illegal action took place should be contacted and an appointment scheduled. The complaint consists of sworn statements of a person concerning facts relating to the commission of an alleged offense. When presented with the laws and regulations against which the charges are to be filed and the evidence of their violation, the magistrate will fill out a summons or warrant depending on the severity of the violations. If the violation is a class 3 or 4 misdemeanor (one which could **not** result in a jail sentence), a summons should always be issued. A summons simply informs the party being charged that they must appear in court. This lowers the potential liability for a false arrest suit if a warrant for arrest is issued and we lose the case in court. Upon completion, the summons or warrant will be given to the local sheriff's department by the magistrate and will be served on the responsible party. The person filing the complaint should request a copy of the summons or warrant for DSS records.

4. Hearing of the Case

§32.1-27 and §28.187 of the Code of Virginia make violations of any regulation of the Board of Health a misdemeanor. Misdemeanors fall in the class of crimes which a Commonwealth's Attorney may, at his discretion, decline to prosecute personally. Although the Division does not need the Commonwealth's Attorney to prosecute the case, we should make a concerted effort to solicit his services in any criminal action.

Prior to the court date, those directly involved with the case should make an appointment with the Commonwealth's Attorney and discuss the facts of the case. All persons directly involved in the case should be present in court, however, witnesses approaching the bench should be kept to a minimum.

After the case has been heard, the compliance officer will write an overview of the case and a statement of findings of the court.

B. Civil Remedies

1. Emergency Orders.

When conditions or circumstances are discovered which pose a **significant** and **immediate** public health threat, the State Health Commissioner may issue an Emergency Order to suppress these hazards. The advantages of an emergency order are that it has a quick response, no hearing is required before it is issued and it is enforceable separately from the regulations or the statute. A hearing will be held after the issuance of the order, and the order may be appealed after the hearing. An emergency order may be obtained upon request by the director to the State Health Commissioner after explaining the circumstances that pose the public health emergency. The director and Commissioner will work with the Attorney General's Office to prepare and implement the order.

2. Injunctions.

An injunction is a court order issued to enforce remedial and preventive decrees or judgements. It may be in the form of a mandatory injunction - issued to command the performance of some act, or a prohibitory injunction - issued to command a party to refrain from doing an act. An injunction can be obtained through both the Commonwealth's Attorney and the Attorney General's Office. In most cases, DSS injunctions will be obtained through the Attorney General's Office.

The primary reason for use of injunctive relief in the Division is to prohibit an uncertified dealer from processing shellfish or crab meat. This use, however, can not be used until other lesser remedies have been exhausted. In most cases this means that we must have gone through criminal procedures, but the penalties involved in misdemeanor violations were not harsh enough to convince the dealer to stop operating. When this occurs, the compliance officer must write an enforcement document to explain the case.

An enforcement referral should then be prepared for the Commissioner to the Attorney General. If the Attorney General's Office agrees that the injunction is worth pursuing, they will direct the process from this point on.

3. Civil Suit.

Civil suits, in DSS cases, will be almost exclusively involved in enforcing Administrative Orders issued by the Commissioner or Board of Health. The Attorney General's Office will have already been involved in the case before it gets to this level. Since enforcement documents and referrals have already been prepared and submitted for cases at this level, all future actions will be dictated by the A. G.'s Office.

C. Inspection Warrants

Inspection warrants may be obtained after an inspection has been attempted and refused. When this occurs, an affidavit (**Appendix B**) and an inspection warrant (**Appendix C**) should be completed. Both the affidavit and the inspection warrant should be presented to the Circuit Court Judge whose jurisdiction encompasses the location of the facility to be inspected for his review and signature.

When an inspection warrant is to be served by DSS, a law enforcement officer, preferably a VMRC officer, should be present. Upon serving the warrant, the warrant should be read in its entirety to the responsible person at the facility, and the inspection should be conducted. Any person interfering with or refusing to allow the execution of the warrant is guilty of a class 3 misdemeanor pursuant to §19.17-397 of the Code of Virginia. If this occurs, the officer in attendance may arrest the person interfering and the inspection may be completed. All product embargoed and/or seized should be counted and recorded on the back of the warrant. After execution of the warrant, it should be filed with the Clerk of the Circuit Court in the locality where it was served.

D. Lacey Act

In any case where illegally harvested or processed product may be entering interstate commerce, the responsible party may be subject to federal charges under the Lacey Act. When it is believed that a facility under investigation is involved in interstate commerce, the National Marine Fisheries Service Office of Enforcement may be contacted. Lacey Act violations depend on the conviction of the responsible party of state charges before federal charges can be filed. NMFS officers may wish to participate in the investigation where the Lacey Act violation may be involved.

PART II - COMPLAINTS

§2.1. Documentation

A complaint may be received by letter, phone, or by personal contact. When a complaint is received, the information given should be recorded on a standard complaint documentation form (**Appendix D**). The complaint should be documented by a sanitarian or supervisor if possible. However, secretarial staff should be familiar with the complaint form in order that they can record the complaint in their absence. Once the information has been organized, a sanitarian or supervisor should review the information to determine if the complaint is a repeat or if it is a new complaint.

§2.2. New Complaints

All new complaints should be followed-up by field visit(s). The complaint should be investigated as many times as necessary to determine if it was justified or not. If information disclosed in the initial investigation proves that the complaint was not justified, the information should be recorded in the "RESULTS OF INVESTIGATION" section of the complaint form. A copy of the form should be retained for filed office records and the original sent to the central office compliance officer.

When the initial investigation reveals conditions that indicate that the complaint was justified, the sanitarian should inform the person(s) contacted that they are in violation of Health Department regulations. If possible, they should be informed of the action necessary to achieve compliance. If the investigation reveals uncertified or potentially contaminated product, action must be pursued as described in §1.2. All information concerning the complaint investigation should be recorded in the "RESULTS OF INVESTIGATION" section of the complaint form. The complaint should be followed up within 15 days and as necessary thereafter.

§2.3. Repeat Complaints

When a complaint is received and upon evaluation is determined to be a repeat, one of two types of action may be taken. First, if the complaint has not yet been investigated, no additional action will be necessary other than the already scheduled investigation. The additional complaint should be documented on a separate form and filed with the other complaint(s). When the complaint received has been previously investigated, the field director must review the initial complaint investigation. If the investigation documentation shows the initial complaint to be unjustified, the supervisor should determine if he believes an additional investigation is necessary. When complaint documentation shows the initial complaint was justified, a reinvestigation should be scheduled. Exceptions to this rule may occur when the problem has been recently corrected, or the field director has significant reason to believe that the problem has not reoccurred.

PART III - SHELLFISH AND CRUSTACEA PLANTS

§3.1. Uncertified or "Bootleg" Operations

Information concerning bootleg shellfish or crustacea processing plants generally comes to the Division in the form of a complaint from certified dealers, other state agencies, or the general public. Before a complaint can be acted on, it must be investigated at the field office level.

A. Investigation

When conducting an investigation of an illegal uncertified shellfish or crab meat processing establishment, the sanitarian should first attempt to make contact with someone at the location described in the complaint. While approaching a door or office, the sanitarian should make observations of the premises without straying from his course, and note anything indicative of a shellfish or crustacea processing establishment (*i.e.*, seafood boxes, shell piles, crab scrap, etc.). In their discussion with the contact, they should inform the person(s) of the purpose of the investigation and ask questions concerning the alleged processing of shellfish or crab meat. The questions should not be leading or accusatory. If at any point you feel threatened or are ordered to leave the property, then leave. If evidence is deemed to be sufficient to justify an inspection warrant, that can be pursued later.

If any investigation reveals uncertified or potentially contaminated product, action must be pursued as described in section 1.2.

When the **first** complaint investigation finds uncertified product or conclusive evidence of illegal processing, no formal legal action should be pursued. Persons found illegally processing for the first time should be educated concerning DSS regulations and warned of potential legal action if uncertified processing continues. When special circumstances apply, a deviation from this procedure may be allowed, however, these cases will be addressed as they occur.

B. Follow-up.

A list of the findings from the investigation should be sent to the central office within a week from the date of the investigation. A follow-up letter will be prepared for the director's signature by the compliance officer.

C. Continued Failure to Comply.

If a person or company fails to comply with the regulations after a personal visit from a DSS representative and a follow-up letter, legal action should be pursued as described in section 1.4.

§3.2. Certified Shellfish and Crustacea Dealers

A. Certification/Recertification

The most effective enforcement tool the Division currently has is the certification process. The regulations currently in place make decertification of a plant difficult in cases other than those involving significant health hazards. Those plants with repeat deficiencies and low inspection scores constantly test our enforcement authority. It is for these reasons that we must take a firm stand during the recertification process against carryover deficiencies. The following items should be considered before a recommendation for certification is submitted.

1. Carryover Deficiencies.

Sanitarians recommending certifications should follow the guidelines of working memo #189 concerning procedures for handling carryover deficiencies. In addition, judgement should be used when determining the length of the recommended certification period, considering the dealer's past record of adherence to compliance schedules.

2. History of non-compliance.

When recommending certification of dealers which have established reputations of slow or nonexistent deficiency correction, short certification periods (e.g. one, two or six months) should be recommended regardless of whether there are carryover deficiencies.

B. Routine Inspection Deficiencies.

1. Critical Items.

Items identified on the HPD-1A form as "critical" items require immediate corrective action. Sanitarians identifying these deficiencies during an inspection should ask the dealer to either immediately correct the deficiency or voluntarily cease operations until the problem can be corrected. If a dealer refuses to take corrective action on a critical item, the sanitarian should contact the central office to discuss the necessary action. Depending on the health significance of the deficiency, an emergency order (§1.4 B.1) or an injunction (§1.4 B.2) may be pursued.

2. Key Items.

Items identified on the HPD-1A form as "key" items require that correction must be accomplished within 15 days. This is not to say that a sanitarian must conduct a follow-up inspection within 15 days for all key items. When two inspections of the same facility do occur less than 15 days apart, the same deficiency will not be considered a repeat since the dealer has not been allowed correction time. Sanitarians identifying two consecutive, or three or more non-consecutive identical key deficiencies during a certification period shall write a repeat deficiency letter. This letter shall outline the specific problem(s) in question with the dates in which they were identified. In cases where an administrative hearing is pending if the deficiency is not corrected, this shall also be added to the repeat deficiency letter.

3. Other Items.

Items identified on the HPD-1A form as "other" items do not require repeat deficiency letters. Sanitarians, however, shall be persistent with dealers during inspections to encourage correction of these deficiencies.

C. Low or Failing Inspection Reports.

A plant inspection which results in a score of below 80% is considered a failing inspection. When, after completion of an inspection, a plant is found to have a failing score, the following procedure should be followed:

- o If an item exists which poses a significant health threat, the sanitarian should ask that the owner immediately correct the problem or voluntarily stop operations until the problem can be corrected. If the dealer refuses to cooperate, an emergency order should be pursued as described in section 1.4 B.1.
- o All critical items identified shall be handled as described in section 3.2 B.1.
- o Once those deficiencies which require immediate action have been addressed, a follow-up inspection should be scheduled within two weeks days to address those problems of lesser significance. Inspections which reveal numerous minor deficiencies are usually the result of poor supervision in the plant. The best enforcement procedure in this situation involves persistence on the part of the sanitarian with the owner to promote better supervisory practices. The compliance officer shall track plants with low and/or failing scores to help determine the need for shorter certification periods should the dealer reapply for a Certificate of Inspection in the future.

NOTICE OF ADMINISTRATIVE HEARING

Informal and formal proceedings are authorized under sections 9-6.14:11 and 9-6.14:12 of the *Code of Virginia*, respectively.

HEARING TYPE:

ISSUED TO:

COMPANY:

ADDRESS:

CERTIFICATION NUMBER:

DATE:

TIME:

LOCATION:

REASON(S) FOR HEARING:

AFFIDAVIT IN SUPPORT OF INSPECTION WARRANT

OWNER:

LOCATION:

PURPOSE FOR WARRANT:

ISSUES:

AUTHORITY: Virginia Board of Health Regulations promulgated under §28.1-176 and §28.1-180 of the *Code of Virginia* state that any person, firm, or corporation operating an establishment where shellfish or crab meat are stored, processed, packed or repacked for the purpose of selling the product to the public must first obtain the approval of the State Health Commissioner in the form of a Certificate of Inspection. In addition, §28.1-183 of the *Code of Virginia* empowers the State Health Commissioner or his designated agents or assistants to enter upon premises located in the Commonwealth where oysters, clams, crab meat, or scallops may be found for the purposes of determining the compliance status of property in relation to the health provisions of the *Code of Virginia* or any regulations promulgated thereunder.

DATE: _____

Virginia Department of Health
Division of Shellfish Sanitation

STATE OF VIRGINIA

CITY/COUNTY OF

The foregoing instrument was subscribed and sworn before me

this _____ day of _____, 19____ by _____.

CIRCUIT COURT JUDGE
CITY/COUNTY OF _____.

INSPECTION WARRANT

To: The Compliance Officer of the
Division of Shellfish Sanitation
or any other Authorized Officer.

You are hereby commanded in the name of the Commonwealth forthwith to search the
business establishment owned by _____ which is described
as _____ follows:

The purpose of the search is to determine:

On the basis of the sworn affidavit of _____,
a copy of which is attached, probable cause to believe that the search should be made is found
and thus authorization to inspect pursuant to §19.2-394, §28.1-176, §28.1-180, §28.1-183 and
§32.1-25 of the *Code of Virginia*, as amended, is hereby granted.

Date:

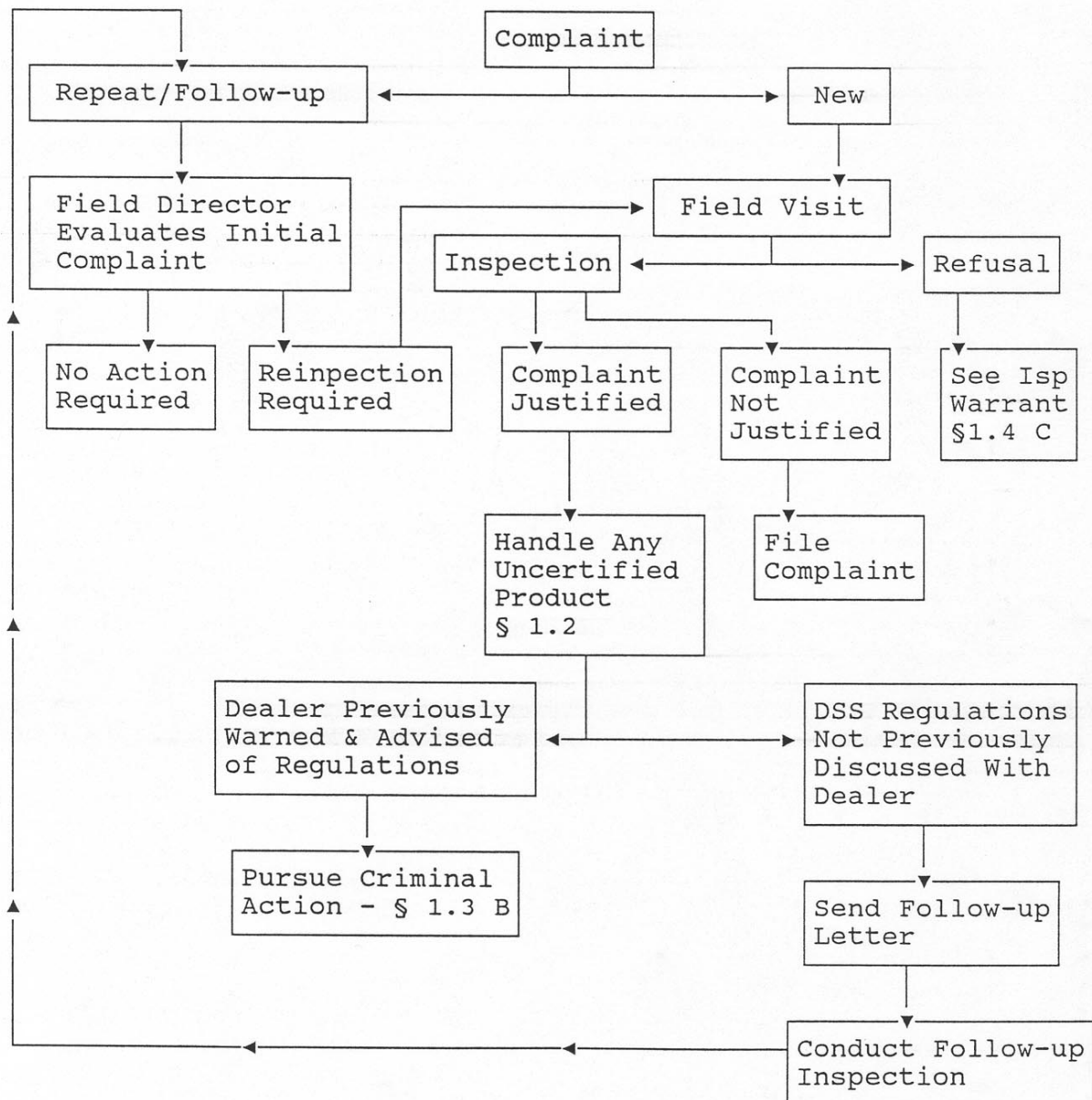
Enter:

CIRCUIT COURT JUDGE
CITY/COUNTY OF _____.

Flow Chart #1

Appendix E

BOOTLEG COMPLAINTS



Flow Chart #2

Appendix F

CERTIFIED SHELLFISH AND
CRUSTACEA DEALERS